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## FREE SPEECH AND THE 'VILLAGE IDIOT'

MELINDA JONES\*

The 'village idiot' usually turns out to be the wisest member of the community.<sup>1</sup> Unafrfraid to be different, the 'idiot' is sensitive to innuendo and dares to challenge the views and behaviour of the town's majority. Of course, if the 'idiot' is a woman, she is a 'witch'. She has knowledge and insight that the majority finds threatening, and she is ridiculed, sent to the edge of town, laughed at or burnt at the stake. Yet her presence has a lasting impact and her ideas resonate with members of the community.

At the end of the millennium, we pretend to take a 'modern' view of the outsider. We legislate to make it an offence to discriminate or harass. But our standards remain those of the 'benchmark male'.<sup>2</sup> Laws and social practices are designed to suit the perceived needs of the majority. Whenever there is an attempt to take seriously principles of equality, the proponents are chased out of town. Being brave, standing up for fundamental values, looking beneath policies to find the principles makes a person an outsider whose ideas are discredited as those of the 'idiot'.

Australia has been accused of being the "idiot of the global village" for attempting to regulate the Internet.<sup>3</sup> The *Broadcasting Services Amendment (Online Services) Act 1999* (Cth) is designed primarily to protect children from offensive online material. Material will be classified; made harder to access, restricted or prohibited; and there will be penalties for not removing classified material. Leaving aside the technical difficulties involved in enforcing the new laws and the alleged vagueness and complexity of the legislation, this article examines the arguments about censorship and freedom of speech on the Internet.

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- \* Senior Lecturer in Law and Director of the Australian Human Rights Centre, University of New South Wales.
  - 1 American First Amendment expert, Dr N Strosser, reportedly commented that Australia's Internet censorship legislation exposed Australia as the "global village idiot". Minter Ellison, *Technology News*, October 1999, available at <[www.minters.com.au](http://www.minters.com.au)>. Minter Ellison argue that the new Internet Industry Codes of Practice are an appropriate response to problems with the *Broadcasting Services Amendment (Online Services) Act 1999* (Cth). *Ibid*.
  - 2 M Thornton, "The Cartography of Public & Private" in M Thornton (ed), *Public & Private: Feminist Legal Debates* (1995) 9 at 12.
  - 3 Note 2 *supra*.

The Internet poses a challenge to both human experience and philosophical doctrine. The technology operating in cyberspace creates a relatively uncharted terrain and its impact is broad reaching. However, as with other developments, such as those arising from the Human Genome project, science must be made to serve the values of society rather than society becoming a slave to science. We need to confront the technology head on, ensuring that valued principles are rethought in light of the technology. This is a matter of strategy rather than principle. Enforcement procedures may require time to develop. However, to the extent to which these procedures reflect our ideological commitments, the difficulties faced in ensuring that principles are kept in place should not be an excuse for avoiding responsibility.

The doctrine of 'freedom of speech' is a fundamental value of liberal democratic thought. It holds that the state cannot tell us what to say, or dictate what we listen to, or censor the content of our messages. The values of free speech are values to which we all adhere. They include the promotion of respect for individual choice and individual difference and inclusion in democratic discourse. Martha Minow, writing of rights generally, notes that they provide entitlement to membership of the community and access to participation in the "conversation of humankind".<sup>4</sup> However, as discussed below, the right to freedom of speech may also be used to deny others rights, to subordinate, and to oppress. Therefore, if rights are designed to achieve equality, then any doctrine, including a doctrine described as a 'right' to free speech, must be circumscribed to ensure that it is consistent with the overarching objective of equality. The objective, as Kant put it, is to consider people "as ends in themselves, not as means to an end".<sup>5</sup> If this requires limiting free speech in certain circumstances or reconstructing the notion of free speech, then this is something that those of us who are committed to human rights must be prepared to do.

## I. FREE SPEECH

The theory of 'freedom of speech' was developed at a time when there was little or no political freedom and limited scope for individual identity. With free speech came political democracy: individual members of the community were given the right to challenge the thoughts and actions of the state and of the majority. Voting rights and participation in the community were modelled on the ideal of the Greek polis, or on the 'town meeting' visualised by Rousseau. Both political control and technology limited access to knowledge of all types, so the right to publish and distribute pamphlets was crucial to the spread of knowledge and to the right to participation in the life of the community. However, the 'right to know', requiring access to knowledge and information and incorporating the idea of freedom of information, is a very modern development of the political ideal of free speech.

4 M Minow, *Making all the Difference. Inclusion, Exclusion and American Law*, Cornell (1990).

5 I Kant, "The Metaphysics of Morals" in H Reiss (ed), *Kant's Political Writings* (1971) 131.

Free speech also relates to personal growth and identity. Freedom of self-expression, as John Stuart Mill first conceived it, is tied to freedom of thought and opinion. Individuals need to be free to test their ideas of identity, without being held accountable to the state. At a time of religious persecution and political repression, adherence to a free speech doctrine was a crucial beginning to the development of capitalism. A free market is predicated on a free market of ideas, where goods are not the only commodities to be exchanged.

In the eighteenth century, political equality was seen to depend on free speech, as the oppressive expression of power was reinforced by proscriptions on the communication of critical thought. In this context, the doctrine of free speech was serving the master of social, political and economic equality. Although often mistaken for a first order principle, free speech has always been a means to a political end. There is no doubt that freedom of the press and freedom of personal identity, including expression of that identity, are pillars on which our society stands. However, once these freedoms are achieved, there is scope to examine their limits to ensure that the pillars are not cracked, and that the value of equality provides cement to keep society's values in place.

To be free enough to reassess the objectives of freedom of speech is a luxury that a western democracy can afford. We can be confident that political freedoms, as well as a full range of acceptable behaviours and thoughts, are given. We are not jailed for protesting or for criticising the state; we can dress as we please; we can be reckless in our choice of words; and we can use technology to communicate our views to a wide audience.<sup>6</sup> While remaining vigilant, we no longer live in fear of the state. Thus, in critiquing the modern manifestations of the doctrine of free speech, there is no danger that we are giving licence for the state to remove the political gains for which we fought so hard. Rather, we are returning to fundamental principles which make seeing the wood from the trees possible.

## II. LIBERAL NOTIONS OF FREEDOM OF SPEECH

While the tradition of freedom of speech can be widely traced, it is John Stuart Mill's *On Liberty* that is generally taken to encapsulate the ideal and the argument of free speech. Mill's theory contains both the basis of the doctrine and the inevitability of its unsustainability. Mill assumed that society was monocultural and that neither class nor gender affected his assumed level playing field. What he saw as the greatest barriers to the progress of mankind (taken by Mill to be that which produces the greatest happiness of the greatest numbers) were the threat posed by the state's power to prevent political dissent, and the threat to individualism posed by state paternalism. Mill believed that if

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6 I am not suggesting either that these rights are fully protected or that they are never curtailed. See, for example, the pages of the *Australian Journal of Human Rights* and B Gaze & M Jones, *Law, Liberty and Australian Democracy*, Law Book Company (1990).

each individual were free to develop her or his potential, then society would progress to a higher state.

Following Mill, liberal theorists offered three reasons why speech should be free. The first reason is the belief that speech is not harmful to others: "sticks and stones may break my bones, but names will never hurt me". This is known as the 'harm principle'.

The second justification for free speech is the belief that unacceptable speech will be sanitised by fresh air: the open wounds can be dressed and warmed by the sun; behind closed doors unacceptable views fester and thrive. This is the argument from truth. The search for truth is considered to be the key to progress. Without free speech, truth cannot be established.

The final idea supporting free speech is the belief in the pernicious, chilling effect that limiting speech will have on the development of thoughts and ideas. It holds that any limitations on speech will cause ideas to shrivel and flounder rather than swell and flourish. This is known as the 'free market of ideas'. Failure to allow a free market of ideas will hinder speech, while achieving very little.

Mill suggested that the right to freedom of speech was a protection against the conservatising forces of government. The context of his work is the emergence of the British Empire as a preeminent force, and the extension of the franchise to working class men. Religious persecution was not a matter of history, and the state was extremely powerful. The 'tyranny of democracy', written about by de Tocqueville, was conformism, which Mill saw as a major impediment to progress. Mill considered free speech to be fundamental in the sense that it was a signifier of autonomy and individualism. In his view, and in the words of a famous graffiti artist, individualism without freedom of opinion and belief constituted by freedom of speech and freedom of religion would be like a fish without a bicycle. However, Mill did not take freedom of speech to be an absolute value. He extended it only to those he felt could use it responsibly. Children and 'primitive/uncivilised nations', who he considered not to be in the "maturity of their faculties", do not have the right to freedom of speech.<sup>7</sup>

### III. EXCLUSIONS/ABSOLUTE

Arguments about prioritising free speech arise in the context of debates about fundamental values. Freedom of political speech is linked to questions of citizenship and political participation. Questions of autonomy are tied up with issues of individualism and individual identity. However there is no suggestion that free speech is an absolute value. Even in the USA there are a range of laws which, although placing restrictions on speech, are not seen to contradict the First Amendment. In Australia, there are laws dealing with defamation, blasphemy, copyright, obscenity, incitement, use of insulting words, official secrecy, contempt of court and of parliament, censorship, sedition and consumer

<sup>7</sup> John Stuart Mill, *On Liberty*, WW Norton & Company (1975) p 11.

protection that place limits on speech. These laws recognise that there are countervailing interests that must take precedence over freedom of speech in some circumstances.

The current law recognises that the maintenance of social cohesion and public order necessitates limits on freedom of speech where it may lead to a breach of the peace. Defamation law accepts that words can seriously injure individuals and their economic and social well being. Words are also prohibited where they cause or threaten to cause serious harm, such as personal injury, property loss or damage to an important institution. It is a crime to counsel another to commit a crime, to commit perjury or to be in contempt of court. Further, we now have a range of civil and criminal laws directed at racial hatred.<sup>8</sup>

International legal instruments also accept that the right to freedom of speech is limited.<sup>9</sup> For example, Article 19(3) of the International Covenant on Civil and Political Rights (“ICCPR”) provides a qualification to freedom of speech that is not made with respect to other Articles of the ICCPR: the exercise of freedom of speech is said to carry with it “special duties and responsibilities”. These special duties and responsibilities mean that law may restrict the right to freedom of speech either to protect public health or morals, or where restrictions are necessary to maintain respect for the rights and reputations of others. Article 20 of the ICCPR elaborates further: “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law”. Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination obliges parties to the Convention to:

[D]eclare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin.

Free speech can be seen as consequent to membership of a community. Citizens are expected to participate in the community and be included in it. Both the threat of state power, and the means of responding to it, are challenges facing responsible members of the society. Autonomy, including individualised opinion and belief, allows for individual growth and progress, which parallels the progress of the state achieved through participation in the market. The importance of political free speech is the freedom it creates in response to the political structure and processes of the state. This means that the political justification of free speech only holds where the speech relates to the activities of the state. Therefore, unless the Internet is seen as operating nationally, or at

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- 8 Anti-Discrimination Act 1977 (NSW), ss 20B-22; Discrimination Act 1991 (ACT), ss 65-7; Criminal Code Act (Compilation Act) 1913 (WA), ss 76-80; Anti-Discrimination Act 1992 (Qld), s 126; Anti-Discrimination Act 1998 (SA). The Racial Discrimination Act 1975 (Cth) was amended by the Racial Hatred Act 1995 (Cth) to include the offence of racial vilification.
- 9 The United Nations Declaration of Human Rights, Article 19; the International Covenant on Civil and Political Rights, Article 19; the Convention on the Rights of the Child, Article 13 and particularly Article 13(2).

least as a community, free speech on the Internet cannot be supported by arguments about political freedom. In this respect, research suggesting that virtual 'communities' are more accurately described as virtual 'places' is particularly noteworthy.<sup>10</sup>

The argument from autonomy, however, is not similarly limited. It does not depend on membership of a society, although it may be seen as an incidence of citizenship. Nonetheless, the importance of free speech for individuality is not necessarily boundless. If there is sufficient scope within the realm of 'real' society for individual expression, it is questionable whether it is necessary for individualism to be supported in cyberspace. Given that one of the attractions of cyber communication is the ability to adopt an assumed personality (for example, by use of an avatar), the Internet may be unimportant for personal development. On the other hand, one could argue that fantasy is an important realm for resolving problems and exploring ideas. In this case, the Internet could be valuable for establishing personal identity.

#### IV. CHALLENGING AND APPLYING THE LIBERAL ACCOUNT OF FREEDOM OF SPEECH

The justifications for the doctrine of freedom of speech suggest that restrictions on speech are legitimate and desirable. The harm principle, which allows restrictions on speech that is harmful but which defines harm extremely narrowly, needs to be recast to take account of modern understandings of harm. The physical and emotional harm inflicted by racist speech, for example, has been well documented.<sup>11</sup> The assumption that it is reasonable for victims to bear harm depends on an unrealistic account of human nature. The harm principle has also been critiqued by feminist accounts of pornography, which demonstrate that:

[T]he types of harm range from offence to insult, defamation, discrimination, and physical injuries, as well as the more subtle effects legitimating domination and subordination on the attitudes of both men and women. The effects are to degrade women, dehumanise them, produce and reinforce the objectification of women, and depict and lead to violence against and coercion of women.<sup>12</sup>

This leads us to the conclusion that it is legitimate within free speech theory to regulate pornography and racist speech.

The harm principle, recast, justifies restrictions of the type proposed by the *Broadcasting Services Amendment (Online Services) Act 1999* (Cth), albeit for

10 Q Jones & S Rafaeli, "User Population and User Contributions to Virtual Publics: A Systems Model" (1999) unpublished.

11 See M Jones, "Empowering Victims of Racial Hatred by Outlawing Spirit Murder" (1994) 1(1) *Australian Journal of Human Rights* 299; M Mastuda, C Lawrence III, R Delgado & K Crenshaw, *Words that Wound*, Westview Press (1993).

12 B Gaze, "Theories of Free Speech, Pornography and Sexual Equality" in T Campbell & W Sadurski (eds), *Freedom of Communication* (1994) 131 at 141-2.

different reasons. However, both the ‘fresh air’ approach and the ‘free market’ approach should be rejected as invalid. There is no evidence that exposing racist views to public scrutiny results in either the rejection of those ideas or the social isolation of racists. Nor is there evidence that denying racists airtime will result in a powerful black market of hate, where racist beliefs will spread and ignite the passion of a dangerous underclass.<sup>13</sup> The liberal account of a free market, in which each idea is debated and truth ultimately wins, assumes a level playing field with an equal distribution of power. However, the speech of the powerful cannot be countered by the voice of the victim. The assumption that the formal equality of each individual results in an equality of power between individuals has the effect of valuing some people (the speakers of racist ideas), while failing to accord equal dignity to the disempowered (the victims of such speech).<sup>14</sup>

## V. CONCLUSION

The Internet provides a powerful forum for the propagation of racist ideas and hatred. No matter how difficult regulation is to achieve, the attempt to regulate is itself valuable. On top of the pain and distress of being racially vilified, victims of racism suffer an additional indignity: that of dispossession. As Matsuda writes:

However irrational racist speech may be, it hits right at the emotional place where we feel the most pain. The aloneness comes not only from the hate message itself, but also from the government response of tolerance. When hundreds of police officers are called out to protect racist marchers, when the court refuses to redress racist insult, and when racist attacks are officially dismissed as pranks, the victim becomes a stateless person. Target-group members can either identify with a community that promotes racist speech, or they can admit that the community does not include them.<sup>15</sup>

Australia is not a ‘village idiot’ in attempting Internet regulation. Rather, there is wisdom even in an unenforceable law.

The use of law to limit freedom of speech is legitimate, according to even the most extreme version of the free speech principle, where what is involved constitutes incitement. Messages of hate incite recipients to hate, to devalue, and ultimately to dehumanise members of the target group. Action taken by governments to limit the spread of racist ideology and to restrict access to

13 K Lasson, “Racial Defamation As Free Speech: Abusing the First Amendment” (1985) 17 *Columbia Human Rights Law Review* 11 at 54. Lasson writes: “[t]o believe that all ugly ideas wither when aired is the height of naiveté. It casts contempt upon history and ignores the most frightening paradox of our time: that Nazi philosophy was born as a legitimate expression of political thought... and that it was embraced by the highly sophisticated German people”. *Ibid*.

14 R Langton comments that “powerful people can generally do more, say more, have their speech count for more than can the powerless. If you are powerful there are more things you can do with your words”. R Langton, “Speech Acts and Unspeakable Acts” in T Campbell & W Sadurski (eds), note 13 *supra* at 99.

15 M Matsuda, “Public Response to Racist Speech: Considering the Victim’s Story” (1989) 87 *Michigan Law Review* 2320 at 2322; Mastuda, Lawrence III, Delgado & Crenshaw, note 13 *supra* at 25

pornography, then, is not only unproblematic from the perspective of freedom of speech, but is also mandated by the democratic commitment to treat all people with equal concern and respect. Whether this action involves proscribing the racist speech of those living in Australia, or preventing racists from visiting our shores to spread their ideas, the action is morally appropriate and justified. Equally, where the messages of hate are delivered in cyberspace, action to restrict the spread of hatred should be applauded not condemned. It is disappointing, therefore, that while choosing to address the concerns of anti-pornography campaigners, the Government has declined to regulate specifically against 'hate speech' on the Internet.